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Hiew Vun Zin v Au Kam Wah & Anor

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HIGH COURT (SANDAKAN) — ELECTION PETITION NO SDK-26 EP-1/6 OF 2013
STEPHEN CHUNG JC
27 AUGUST 2013

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Election — Petition — Allegation of corrupt and illegal practices — Allegation that candidate had resorted to bribery, intimidation and that there were voters who were not resident in constituency — Declaration that election invalid and void — Declaration that candidate not duly elected or ought not to be reported as elected — Whether allegations proven

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The petitioner represented the Democatic Action Party ('DAP') while the first respondent represented Gerakan as candidates in the State Constituency of N45 Elopura, Sabah. The first respondent won the Elopura seat by a majority. The petitioner alleged that the first respondent had resorted to general bribery; intimidation; non-compliance of art 19 of the Federal Constitution as there were voters who were not resident within N45; non-compliance of regs 24, 24A, 25, 25A and 25D of the Elections (Conduct of Elections) Regulations ('ECER') relating to the conduct of the election that had extensively prevailed that it might be reasonably supposed to have affected the result of the election and did in fact so affected it; and that there were various offences under the Election Act 1958, all of which affected and did have a determining influence on the result of the election. In this election petition, the petitioner claimed against the respondents that he had a right to be returned at such election. The petitioner claimed for reliefs for a declaration that the election for N45 was invalid and void; a declaration that the first respondent was not duly elected or ought not be reported as elected; a determination on and orders under s 36 of the Election Petition Offences Act 1954 ('EOA'); and an order under reg 26 of the ECER that the ballot papers relating to the said election be produced for inspection by the court.

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Held, striking out the petition with costs of RM30,000 to the first respondent and RM15,000 to the second respondent:

(1) The petitioner did not plead or identify whether these officers were from the Election Commission, whether from the police, from such other government departments or agencies or whether they were officers or agents or servants or nominees of the first respondent. The petitioner did not plead or identify who among these officers acting for on behalf of the respondents had in any way or manner intimidated the voters so as to induce or influence the voters or police personnel to vote for the first

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respondent or not to vote for the petitioner. The petitioner also did not state or identify who and how many of these voters or police personnel who were or had been intimidated by any such officers acting for or on behalf of the respondents so as to vote for the first respondent or not to vote for the petitioner so that they might be reasonably supposed to have affected the result of the election (see para 34).

(2) The petitioner did not state or identify the first voter or the second voter or such subsequent voters who had entered the stream and whose names were recorded by such officers in sequence and were so intimidated as a result that they voted for the first respondent or did not vote for the petitioner. The petitioner did no state how the ballot papers put inside the ballot box and taken out for counting would expose and/or compromised the identifying of each voter who had voted at the election. There were no merits on the objections raised by the petitioner and there was no necessity for the ballot papers, documents and records to be produced and inspected to determine the correctness of the number of ballot papers and the votes counted for each candidate (see paras 35 & 53).

(3) The petitioner did not comply with the requirements of s 32(a) of the EOA and r 4 of the Rules, was defective and should be struck out. Although the petitioner complained that there were 4,000 voters whose grant of citizenship was under investigation, 1,400 of whom were without address and 700 out of these 4,000 voters had voted earlier, unless and until the investigation has been completed, there were no merits in these allegations. There was no declaration made to revoke the citizenship of these alleged 4,000 voters. There were no declarations made to prevent or stop these alleged 700 voters. Unless and until their citizenship had been revoked, they were entitled to vote in the constituency in which they were registered (see paras 36 & 40).

[Bahasa Malaysia summary

Pempetisyen mewakili Parti Tindakan Demokratik ('DAP') sementara responden pertama mewakili Gerakan sebagai calon dalam Kawasan Pilihan raya Negeri N45 Elopura, Sabah. Responden pertama menang kerusi Elopura dengan majoriti. Pempetisyen mendakwa bahawa responden pertama telah mengamalkan rasuah; intimidasi; ketidakpatuhan dengan perkara 19 Perlembagaan Persekutuan memandangkan terdapat pengundi-pengundi yang bukan penduduk dalam kawasan N45; ketidakpatuhan dengan peraturan-peraturan 24, 24A, 25, 25A dan 25D Peraturan-Peraturan Pilihan Raya (Penjalanan Pilihan Raya) 1981 ('Peraturan-Peraturan') berkaitan penjalanan pilihan raya yang secara luas mungkin dianggap menjejaskan keputusan pilihan raya dan ia sememangnya menjejaskannya; dan bahawa terdapat pelbagai kesalahan di bawah Akta Pilihan Raya 1958, yang mana kesemuanya menjejaskan dan memang mempunyai pengaruh yang

menentukan ke atas keputusan pilihan raya. Dalam petisyen pilihan raya ini, pempetisyen mendakwa terhadap responden-responden bahawa dia mempunyai hak untuk pulang untuk pilihan raya sedemikian. Pempetisyen menuntut untuk relief perisytiharan bahawa pilihan raya untuk N45 adalah tak sah dan batal; perisytiharan bahawa responden pertama tidak diplih dengan sewajarnya atau tidak patut dilaporkan sebagai dipilih; penentuan atas dan perintah-perintah di bawah s 36 Akta Kesalahan Petisyen Pilihan Raya 1954 ('Akta'); dan perintah di bawah peraturan 26 Peraturan-Peraturan bahawa kertas undi berkaitan pilihan raya tersebut dikemukakan untuk siasatan oleh mahkamah.

Diputuskan, membatalkan petisyen dengan kos sebanyak RM30,000 kepada responden pertama dan RM15,000 kepada responden kedua:

(1) Pempetisyen tidak memplid atau mengenal pasti sama ada pegawai-pegawai ini adalah daripada Suruhanjaya Pilihan Raya, sama ada daripada polis, daripada jabatan kerjaan yang lain atau agensi atau sama ada mereka adalah pegawai-pegawai atau ejen-ejen atau pembantu-pembantu atau wakil responden pertama. Pempetisyen tidak memplid atau mengenal pasti siapa di antara pegawai-pegawai ini bertindak bagi pihak responden-responden telah dalam cara mana atau sikap menakutkan pengundi-pengundi seperti untuk memujuk atau mempengaruhi pengundi-pengundi atau pegawai-pegawai polis untuk mengundi bagi pihak responden pertama atau untuk tidak mengundi pempetisyen. Pempetisyen juga tidak menyatakan atau mengenal pasti siapa dan berapa banyak pengundi-pengundi ini atau pegawai polis yang atau telah ditakutkan oleh mana-mana pegawai tersebut bertindak atau bagi pihak responden-responden untuk mengundi responden pertama atau untuk tidak mengundi untuk pempetisyen oleh itu mereka mungkin dianggap menjejaskan keputusan pilihan raya (lihat perenggan 34).

(2) Pempetisyen tidak menyatakan atau mengenal pasti pengundi pertama atau pengundi kedua atau pengundi kemudiannya yang memasuki aliran ini dan nama yang direkodkan oleh pegawai-pegawai tersebut berturut-turut dan telah ditakutkan dan akibatnya mereka mengundi untuk responden pertama atau tidak mengundi untuk pempetisyen. Pempetisyen tidak menyatakan bagaimana kertas undi yang diletakan di dalam kotak undian diambil keluar untuk pengiraan akan mendedahkan dan/atau kompromi untuk mengenal pasti setiap pengundi yang mengundi di pilihan raya tersebut. Tiada merit atas bantahan yang dibangkitkan oleh pempetisyen dan tidak perlu untuk kertas undi, dokumen dan rekod dikemukakan dan disiasat untuk menentukan ketepatan nombor kertas undi dan undian yang dikira untuk setiap calon (lihat perenggan 35 & 53).

(3) Pempetisyen tidak mematuhi kehendak s 32(a) Akta dan peraturan 4 Peraturan-Peraturan, adalah cacat dan patut dibatalkan. Walaupun pempetisyen mengadu bahawa terdapat 4,000 pengundi yang pemberian kerakyatannya di bawah siasatan, 1,400 pengundi yang tidak mempunyai alamat dan 700 daripada 4,000 pengundi telah mengundi sebelumnya, kecuali dan sehingga siasatan telah selesai, tidak terdapat merit dalam dakwaan-dakwaan ini. Tiada perisytiharan yang dibuat untuk membatalkan kerakyatan 4,000 pengundi yang didakwa ini. Tiada perisytiharan dibuat untuk menghalang atau menghentikan 700 pengundi yang didakwa ini. Kecuali dan sehingga kerakyatan mereka dibatalkan, mereka berhak untuk mengundi di dalam kawasan tersebut yang mana mereka telah didaftar (lihat perenggan 36 & 40).]

Notes

For cases on allegation of corrupt and illegal practices, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2125–2129.

Cases referred to

Ahmad Jamaluddin Abd Majid v Rafidah bt Aziz & Ors [2009] 5 MLJ 285; [2009] 2 CLJ 785, HC (refd)

Gan Joon Zin v Fong Kui Lun & Ors [2004] 4 CLJ 729, FC (refd)

Kho Whai Phiaw v Chong Chieng Jen [2009] 4 MLJ 776; [2009] 3 CLJ 201, FC (refd)

Mahari bin Endut v Dato' Hj Mat Razali bin Kassim & Ors [2009] 4 CLJ 488, FC (refd)

Mohd Nazri bin Hj Din v Dato' Seri Raja Ahmad Zainuddin bin Raja Hj Omar & Ors [2009] 3 MLJ 589; [2009] 3 CLJ 221, FC (refd)

Mohd Zaid bin Ibrahim v P Kamalanathan a/l P Panchanathan & Ors [2010] 6 MLJ 363; [2010] 8 CLJ 608, HC (refd)

Muhammad Sanusi bin Md Nor lwn Mohd Tajuddin bin Abdullah dan lain-lain [2009] 8 MLJ 131; [2009] 1 CLJ 1, HC (refd)

Tg Nawawi Tengku Ab Kadir v Lokman Muda & Ors [1996] 1 CLJ 551, HC (refd)

Wong Hua Seh v Ding Kuong Hiing [2009] 2 MLJ 325; [2009] 3 CLJ 475, FC (refd)

Legislation referred to

Elections (Conduct of Elections) Regulations 1981 regs 24, 24A, 24(1)(a), (b), (c), 25, 25(3), (4), (12)(b), 25A, 25D, 26

Elections Act 1958 ss 5(1)(a), 9A

Election Offences Act 1954 ss 4(a), 7, 8, 9, 9(1), 10, 10(a), (c), (d), (e), (f), (g), (h), 11, 11(1)(a), (b), 23(1)(a), 32, 32(a), (b), (c), (d), (e), 36, 38(1), (2)

Election Petition Rules 1954 r 4(1)(b), (4)

Federal Constitution art 119, 119(1)

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Lim Chee Wee (Ansari & Chen Kok On with him) (MF Poon, Hiew & Associates) for the petitioner.
Teressa bt Sirri (Chin Lau Wong & Foo Advocates) for the first respondent.
Mohd Radhi Abas (Senior Federal Counsel, Attorney General's Chambers) for the B *second respondent.*

Stephen Chung JC:

C **[1]** In the recently concluded 13th General Election held on 5 May 2013, the petitioner representing the Democratic Action Party (DAP) was a candidate in the State Constituency of N45 Elopura, Sabah. The other two candidates in N45 were Au Kam Wah (the first respondent) representing Gerakan which is part of Barisan Nasional (BN) and Liaw Fook Kong representing SAPP.

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[2] The first respondent received 8,105 votes and won the Elopura seat by a majority of 251 votes. The petitioner received 7,854 votes and Liaw Fook Kong of SAPP received 469 votes. The election results were published in the Government *Gazette* PU 231 dated 22 May 2013.

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[3] The petitioner presented this election petition on 11 June 2013 against the first respondent and the Election Commission as the second respondent that he is a person claiming to have had a right to be returned at such election and claimed reliefs as follows:

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(a) a declaration that the election for N45 was invalid and void;

(b) a declaration that the first respondent was not duly elected or ought not be reported as elected;

G (c) determination on and orders under s 36 of the Election Offences Act 1954 ('EOA'); and

(d) an order under reg 26 of the Elections (Conduct of Elections) Regulations 1981 ('ECER') that the ballot papers relating to the said H election be produced for the inspection of the court.

[4] The petitioner sought to avoid the election of the first respondent on the grounds that:

I (a) there was general bribery at the material times, before, at or during the election under s 32(a) of the EOA that has so extensively prevailed that it may be reasonably supposed to have affected the result of the election and did in fact so affect it;

(b) there was general intimidation at the material time during the election

under s 23(a) of the EOA that has so extensively prevailed that it may be reasonably supposed to have affected the result of the election and did in fact so affect it;

(c) non-compliance of art 119 of the Federal Constitution in that there were voters on the electoral list who were not resident within N45 and who had in fact voted in the election;

(d) non-compliance of regs 24, 24A, 25, 25A and 25D of the ECER relating to the conduct of the election that has no extensively prevailed that it may be reasonably supposed to have affected the result of the election and did in fact so affected it;

(e) that there were commission of various offences under ss 4(a) of the EOA, 5(1)(a) of the Elections Act 1958 ('EA') and O 15(4) of the ECER prohibited under the EOA and EA thereby breaching s 32(b) of the EOA, all of which affected and did have a determining influence on the result of the election.

[5] By a letter dated 4 July 2013, the first respondent gave notice to the petitioner of his intention to raise the following preliminary objections to strike out the petition:

(a) The election petition does not disclose any reasonable cause of action against the first respondent;

(b) The petitioner has failed to comply with the mandatory requirements of r 4(1)(b) of the Election Petition Rules 1954 (Rules) read together with s 32(a) of the EOA in that the petitioner has failed to state specifically in the election petition as to how the alleged general bribery allegedly committed by the first respondent, his agents and nominees has affected the result of the election;

(c) The petitioner has failed to comply with the mandatory requirements of r 4(1)(b) of the Rules read together with s 32(b) of the EOA in that the petitioner has failed to state the state the facts and grounds as to how the non-compliance with the provisions of the law relating to the conduct of the election has affected the result of the election;

(d) The petitioner has ignored and contravened s 9A of the Elections Act 1958 (EA) by questioning the electoral roll of the State Constituency N45 Elopura, Sabah. Section 9A provides that once an electoral roll has been certified or recertified and notice of such fact has been published in the gazette, it 'shall be deemed to be final and binding and shall not be questioned or appealed against, or reviewed, quashed or set aside by any court';

(e) The petitioner has failed to state specifically as to how the presiding officer has offended reg 25(12)(b) of the ECER when the counting agents

A from BN and DAP (the political party which the petitioner stood for in the election) have clearly stated that there were only 259 votes with three votes rejected (total 262 votes) which means that only 262 registered voters out of the 350 registered voters have turned up and voted at Stream 1 at Sekolah Menengah Kebangsaan Muhibbah on 5 May 2013;

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(f) The petitioner's application under reg 26 of the ECER 1981 for an order of the court to inspect the ballot papers, documents and records of the said election should not be allowed as reg 26 is only applicable to the ballot papers and documents relating to the official addition of votes (the votes of the postal voters).

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[6] On 5 July 2013, the petitioner raised a preliminary objection against the second respondent that the notice of appointment of advocate or of a senior federal counsel ('SFC') by the second respondent was defective in not giving the name of an advocate or the name of a SFC whom it has authorised to act as its advocate and therefore the second respondent could not be represented by a SFC who was not named in the notice to appear in the petition hearing.

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[7] On the same date, the second respondent gave notice of its intention to raise preliminary objections that the election petition was defective and be struck out. The preliminary objections subsequently via a letter dated 8 July 2013 were as follows:

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(a) Paragraphs 5.1, 6, 7, 8, 9 and 10: the facts and grounds relied on fail to comply with r 4(1)(b) read together with r 4(4) of the Rules 1954 and s 32(a) of the EOA as the facts and grounds relied on petition unable to sustain relief sought by the petitioner;

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(b) Paragraphs 5.2, 11, 12, 13 and 14: the facts and grounds relied on fail to comply with r 4(1)(b) read together with r 4(4) of the Rules and s 32(b) of the EOA as it based on the provision of law that has been repeated. As such the facts and grounds relied on petition unable to sustain relief sought by the petitioner;

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(c) Paragraphs 5.3.1, 15, 16, 18, 20, 21, 22 and 23: the election judge is not conferred with the jurisdiction to question the electoral roll since it deemed to be final and binding as provided for in s 9A of the EA. Thus, the facts and grounds relied on in the petition fail to disclose any cause of action or is 'frivolous and vexatious' or is 'abuse of the court's process';

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(d) Paragraphs 5.3.3, 24, 25, 26, 27 and 28: the facts and grounds relied on fail to comply with r 4(1)(b) read together with r 4(4) of the Rules and s 32(b) of the EOA because the facts and grounds relied on in the petition are unable to sustain the relief sought by the petitioner; and

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(e) Paragraphs 29 and prayer (d): the prayer sought is 'frivolous and

vexatious' or is an 'abuse of the court's process' as the election court is not the proper forum to hear and grant the prayer.

[8] Firstly, I shall deal with the preliminary objection raised by the petitioner that the notice of appointment of advocate by the second respondent was defective in not giving the name of an advocate or a SFC whom it has authorised to act as its advocate or counsel in this petition. On 22 July 2013, the petitioner applied to withdraw this preliminary objection against the second respondent with the consent of the second respondent and the same was struck out.

[9] On the preliminary objections raised by the respondents, the petitioner submitted that the power to strike out should only be exercised if the petition failed to contain sufficient pleadings to establish the elements of ss 32(a) and (b) of the EOA. The petitioner submitted that the details pleaded in the petition are proper and extensive details There were not, as argued by the respondents in their preliminary objections, flimsy or lacking in particularity. It was submitted there were sufficient particulars under s 32 of the EOA which have been pleaded in accordance with r 4(1)(b) and 4(4) of the Rules. It was submitted that it was axiomatic that the petitioner was entitled to rely on any of the grounds set out in s 32(a)–(e) of the EOA to void the election result provided that sufficient pleadings or particulars in respect of that ground have been pleaded.

[10] The petitioner submitted that the pleadings of general bribery and general intimidation were pursuant to s 32(a) of the EOA and not under s 32(b). It was submitted that the threshold under s 32(a) of the EOA that they may be reasonably supposed to have affected the result of the election is lower than the threshold under s 32(b) of the EOA that such non-compliance affected the result of the election. The petitioner also submitted that there was no need to specify or provide the names, times, dates and occasions on general bribery under s 32(a) or (b) of the EOA in the petition which contrasted with the mandatory requirements regarding corrupt practice under s 32(c) of the EOA to be pleaded and specified in the petition, referring to *Kho Whai Phiaw v Chong Chieng Jen* [2009] 4 MLJ 776; [2009] 3 CLJ 201.

[11] It is settled law that an election judge has the jurisdiction to strike out a defective election petition without the need to go through the process of a full hearing: *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729, *Ahmad Jamaluddin Abd Majid v Rafidah bt Aziz & Ors* [2009] 5 MLJ 285; [2009] 2 CLJ 785.

[12] It is also settled law that in election cases, strict compliance of the election legislations and regulations is required otherwise any election petition

will be rendered defective and liable to be struck out in limine. Under r 4(1)(b) of the Rules it is mandatory that an election petition shall state briefly the facts and grounds relied upon to sustain the prayers sought for: *Mahari bin Endut v Dato' Hj Mat Razali bin Kassim & Ors* [2009] 4 CLJ 488. The facts complained of narrated in a petition must relate or associate the complaints with the provision of election laws the respondents are alleged to have transgressed. There must be such a nexus pleaded: *Gan Joon Zin v Fong Kui Lun & Ors* at p 744. The facts to be pleaded must be such as to make out a case for the petitioner: *Mohd Nazri bin Hj Din v Dato' Seri Raja Ahmad Zainuddin bin Raja Hj Omar & Ors* [2009] 3 MLJ 589; [2009] 3 CLJ 221.

[13] I shall now deal with the preliminary objections raised by the first and second respondents on the complaints of general bribery alleged by the petitioner in paras 5.1, 6, 7, 8 and 9 of his petition to avoid the election of the first respondent in N45 Elopura. These are set out as follows:

> 5.1 General Bribery
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> That there was at the material time or times, before, at or during the said election general bribery under s 32(a) of the Election Offences Act 1954 ('EOA'), that has so extensively prevailed that it may be reasonably supposed to have affected the result of the said election, and did in fact so affect it.
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> 6. General Bribery
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> Your petitioner states that as a result of general bribery, the first respondent was wrongly returned or unlawfully returned.
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> 7. Your petitioner pleads that at the material time or times, before, at or during the said election, under the guise of a programme entitled Bantuan Rakyat 1 Malaysia ('BRIM'), the electorate was promised monies or grant of advantages in money or similar terms at or after the Election, or in fact paid monies before, during or on the date of the said election and, thereafter, to voters in the electorate in State Constituency N45 of Elopura.
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> Particulars:
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> (a) At all times material to the said election in the State Constituency of N45 Elopura, the first respondent, and or the BN, its servants agents and or nominees acting for and on behalf of the first respondent, paid out monies to the voters of Elopura under a programme entitled 'Bantuan Rakyat 1 Malaysia' ('BRIM') as an inducement to vote for the first respondent;
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> (b) Such payments out of monies to the voters at Elopura were widespread and extensively prevailed during the said election;
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> (c) BRIM was nationwide programme implemented by the coalition known as Barisan Nasional ('BN') that was, at the material time, and still is, in control of the Government. Under the programme, monetary inducements were paid out to voters in all parts of Malaysia, including Elopura, before, at, during or shortly after the 13th General Election which was held on 5 May 2013;

(d) At all times material to the said election, statements were made by the Chairman of the Barisan Nasional, Y Bhg Dato Seri Najib Tun Razak, who was at all material times the Prime Minister, to the following effect: That BRIM payments would be made to voters if voters supported and voted for candidates of the ruling party controlling the Government of Malaysia, namely BN;

(e) Further statements were made to the effect that if voters voted in BN candidates so as to enable BN to continue in power after the said election, the voters would be paid, in the future a further increased inducement of RM1,200.00 per voter; or words to that effect;

(f) Although the avowed purpose of the BRIM payment was to assist voters of the lower income group, in truth and in substance the BRIM payments, when taken as a whole, constituted general bribery under s 32(a) of the EOA;

(g) The persons who were targets of the general bribery aforesaid are so numerous that it is not practicable to provide particulars of all their names However, the BN coalition and its agents, including the first respondent, have full knowledge of the persons who received the said BRIM payments in the state constituency of Elopura;

[14] The petitioner in para 8 of the petition complained that such promises made tantamount to general bribery and were reasonably supposed to have affected the results of the elections In para 9 of the petition, it was contended that such general bribery under the BRIM programme has so extensively prevailed, and was of so pervasive of nature within and at the State Constituency N45 Elopura at the material time, that it may be reasonably supposed to have affected the result of the said election, and did in fact so affect it.

[15] The petitioner submitted that the complaints of general bribery were made pursuant to s 32(a) of the EOA and therefore were not caught by s 32(c) in respect of corrupt practice. What is a 'corrupt practice' for the purpose of the Act? In *Kho Whai Phiew v Chang Chieng Jen* [2009] 4 MLJ 776: Kuching Election Petition No 26–01–2008-I, Clement Skinner J (as he then was) ruled that the answer is found in Part III of the Act where certain acts are defined and categorised as 'corrupt practices'. Section 7 defines the offence of personation, s 8 defines the offence of treating, s 9 defines the offence of undue influence and s 10 defines the offence of bribery. These have all been categorised as 'corrupt practices'.

[16] While ss 7, 8, 9(1), 10(a), (c) and (e) of the Act defines the offence of personation, treating, undue influence and bribery respectively, it is s 11(1)(a) and (b) and of the Act which makes personation, treating, undue influence and bribery the offence of corrupt practice. To constitute a complete cause of action

of the ground of bribery or general bribery, which has been defined as a corrupt practice, the petitioner in this case must plead the requisite sections namely, s 10(a), (c) and (e), s 11(1)(b), s 32(a) and s 32(c), since they are the relevant sections which define bribery, the particular type of corrupt practice complained of, make the particular offence a corrupt practice and which allow for the avoidance of the election on that ground: *Kho Whai Phaiw v Chong Chieng Jan*.

[17] On appeal, the Federal Court affirmed the decision of the election judge. It was held that without the reliance on s 11 of the Act which makes bribery an offence of corrupt practice, there is an essential missing link between s 10 and s 32(c) of the EOA. In other words, all the requisite sections to sustain the ground of bribery to avoid the election must be pleaded in the petition: see *Kho Whai Phiew v Chang Chieng Jen* [2009] 4 MLJ 776; [2009] 3 CLJ 201.

[18] Reading the election petition, the petitioner only pleaded s 32(a) of the EOA in para 5.1 to sustain the ground of general bribery. The petitioner failed to plead s 10(a), (c), (e), s 11(1)(b) and s 32(c) of the EOA. The petitioner failed to plead the facts which must relate or associate the complaints with the provisions of the election laws the respondents are alleged to have transgressed such as to make out a case against the first and second respondents in paras 5.1, 6, 7, 8 and 9 of the petition. The petition is defective.

[19] Further, the petitioner pleaded that the respondents were responsible for general bribery and that the general bribery have so extensively prevailed that they may be reasonably supposed to have affected the result of the election. In the paras (a), (b), (c), (d), (e), (f) and (g) of the particulars of para 7 of the petition, the petitioner specifically alleged that the first respondent, and or the BN, its servants, agents and or nominees acting for and on behalf of the first respondent, paid out monies to the voters of Elopura under BRIM as an inducement to vote for the first respondent.

[20] Although the petitioner submitted that there was no need to specify or provide the names, times, dates etc on the general bribery, the petitioner must identify, set out and substantiate his allegations that the first respondent by wrongful means had induced or influenced such voters or persons to do or not to do a thing which they might otherwise have not done or done ie to vote for the first respondent or not to vote for the petitioner as a result of bribery by paying monies to the voters. In failing to do so, no distinction was made between the voters who were favourably inclined towards the respondents and those who were not: *Mohd Nazri bin Hj Din v Dato' Seri Raja Ahmad Zainuddin Raja Hj Omar & Ors*, *Mohd Zaid bin Ibrahim v P Kamalanathan a/l P Panchanathan & Ors* [2010] 6 MLJ 363; [2010] 8 CLJ 608.

[21] The petitioner however in the abovementioned paragraphs of his election petition did not provide or set out any particulars on the dates, places, times and or on the occasions when the first respondent was alleged to have paid out monies to the voters of Elopura under BRIM as an inducement to vote for the first respondent. The petitioner did not identify or set out the names of the persons or voters who were paid and induced or influenced by the first respondent to vote for the first respondent or otherwise not to vote for the petitioner as a result of the payments made. Therefore the facts pleaded did not disclose the commissions of an offence under s 10(a), (c) and (e) of the EOA.

[22] The petitioner then pleaded and submitted that the persons who were paid monies and induced by the first respondent were so numerous that it was not practicable to provide particulars of all their names The petitioner however also did not plead s 10(d), (f), (g) and (h) of the EOA. The petition showed that he did not and could not even provide a single name of such a voter who was so paid and induced to vote for the first respondent or not to vote for the petitioner in the election as a result of the bribery as alleged.

[23] The petitioner also did not identify the component parties of the BN or the government agencies and or the names of the servants, agents and or nominees acting for and or of such parties, agencies or behalf of the first respondent who were involved and or had paid out monies to the voters in Elopura under BRIM as an inducement to vote for the first respondent or not to vote for the petitioner.

[24] The petitioner failed to establish in the petition that there was an element of bargaining under the BRIM programme in Elopura between the first respondent or his agents and the voters in Elopura. The petitioner failed to identify these voters who bargained or accepted the bargain to vote for the first respondent. The petitioner has failed to plead that there was a counter promise by the voters to vote for the first respondent in return of the BRIM payments The BRIM payments and the alleged promise made by BN Chairman to a further increase of RM1,200 per voter in future was merely an election promise and were not sufficient to constitute a bargain: see *Wong Hua Seh v Ding Kuong Hiing* [2009] 2 MLJ 325; [2009] 3 CLJ 475. Therefore, the petitioner has failed to comply with the mandatory requirements of ss 10, 11, 32(a) and 32(c) of the EOA and r 4(1)(b) of the Rules. The petition is defective and ought to be struck out.

[25] Next, in paras 5.2, 11, 12, 13 and 14 of the petition, the petitioner complained that during the election there was general intimidation under s 23(a) of the EOA that have so extensively prevailed that they may be reasonably supposed to have affected the result of the election. The respondents raised the objection that the facts and grounds relied on by the petitioner failed

to comply with r 4(1)(b) read together with r 4(4) of the Rules and s 32(a) of the EOA were unable to sustain the relief sought by the petitioner.

[26] These paragraphs are set out as follows:

> 5.2 General Intimidation:
>
> That there was at the material time during the said election general intimidation under s 23(a) of the EOA, that has so extensively prevailed that it may be reasonably supposed to have affected the result of the said election, and did in fact so affect it.
>
> 11 Your petitioner states that as a result of general intimidation, the first respondent was wrongly returned or unlawfully returned.
>
> 12 Your petitioner pleads that at the material time or times before or during the said election, officers were placed at the entrance to voting streams to record the sequence or make a numerical list of the names of voters as they entered the respective streams to vote so as to match the particular voter to the each successive ballot paper cast, in order to trace and identify whom each voter voted for.
>
> 13 Such acts of exposure of voters and their votes tantamount to general intimidation which would reasonably supposed to have affected the results of the elections by discouraging voters from casting their votes freely and independently, for fear of dire consequences or adverse repercussion thereof.
>
> 14 Such intimidation of voters was of so pervasive of nature within and at the Parliamentary Constituency of Sandakan, including the State Constituency N45 Elopura at the material time, that it may be reasonably supposed to have affected the result of the said election, and did in fact so affect it.

[27] It is obvious that the petitioner has intended in his election petition relied on general intimidation that have so extensively prevailed that they may be reasonably supposed to have affected the result of the election as a ground that the election of the first respondent be declared to be void under s 32(a) of the EOA. It must be emphasised that the petitioner in para 5.2 of his petition however has pleaded and relied on s 23(a) instead of s 32(a) of the EOA that there was general intimidation during the election.

[28] Section 23 of the EOA governs the return and declaration respecting election expenses and not with general intimidation or general bribery or general treating which is under s 32(a) of the EOA. Further, there is no s 23(a) of the EOA. There was a s 23(1)(a) of the EOA which has been repealed and therefore the petitioner could not and cannot rely on s 23(a) of the EOA to ground his complaint against the respondent that there was general intimidation during the election to avoid the election of the first respondent at the election. Obviously, the petition was defective on this ground to sustain the prayer.

[29] The petitioner submitted that the reference to s 23(a) of the EOA was

obviously a mistake or typing error and that the mistake was not fatal to the petition. It should be noted that there was no application by the petitioner to amend the mistake or typing error.

[30] Section 38(2) of the EOA provides that an election petition presented in due time, within 21 days of the date of publication of the result of the election in the *Gazette*, may be amended with the leave of a judge of the High Court within the time within which an election petition may be presented.

[31] The result of the election was published in the *Gazette* on 22 May 2013. The 21 days to present the election petition pursuant to s 38(1) of the EOA expired on 12 June 2013. This election petition was presented at the Registry of the High Court at Sandakan on 11 June 2013. Any amendment to the petition with the leave of a judge must be made within the said 21 days ie on or before 12 June 2013. Up to now there was no application nor any amendment to para 5.2 of the petition.

[32] Paragraph 5.2 of the petition, as it stands, still relies on s 23(a) of the EOA to ground the petitioner's complaint that there was general intimidation during the election which was erroneous. Therefore the petitioner could not rely on the ground that there was general intimidation pursuant to s 23(a) of the EOA to sustain the prayer. For the reason given, the petition ought to be struck out.

[33] For sake of completeness, I refer to para 12 and the particulars thereto, and to paras 13 and 14 of the petition referred to above. The complaint was in respect of the early voting polling station at the District Police Headquarters of Sandakan. The petitioner did not plead or identify or set out how many, who, their identity or name, of the officers who were placed at the entrance of the particular voting streams to record the sequence or make a numerical list of the names of voters as they entered the respective streams to vote in order to trace and identify who were these voters who had voted for the first respondent or for the petitioner.

[34] The petitioner did not plead or identify whether these officers were from the Election Commission, whether from the Police, from such other government departments or agencies or whether they were officers or agents or servants or nominees of the first respondent. The petitioner did not plead or identify who among these officers acting for or on behalf of the first and or the second respondents had in any way or manner intimidated the voters so as to induce or influence the voters or police personnel to vote for the first respondent or not to vote for the petitioner. The petitioner also did not state or identify who and how many of these voters or police personnel who were or had been intimidated by any such officers acting for or on behalf of the first

respondent or second respondent so as to vote for the first respondent or not to vote for the petitioner so that they may be reasonably supposed to have affected the result of the election.

[35] The petitioner did not state or identify the first voter or the second voter or such subsequent voters who had entered the stream and whose names were recorded by such officers in sequence and were so intimidated as a result that they voted for the first respondent or did not vote for the petitioner. The petitioner did not state how the ballot papers put inside the ballot box and taken out for counting would expose and or compromised the identify of each voter who had voted at the election.

[36] Reading paras 5.2, 11, 12, 13 and 14 of the petition, the petition did not comply with the requirements of s 32(a) of the EOA and r 4 of the Rules, is defective and should be struck out: see *Gan Joon Zin v Fong Kui Lun & Ors, Mohd Nazri Hj Din v Dato' Seri Raja Ahmad Zainuddin bin Raja Hj Omar & Ors.*

[37] In paras 15, 16, 17, 18, 19, 20, 21, 22 and 23 of the petition, the petitioner complained that there is non-compliance of art 119 of the Federal Constitution which relates to the conduct of the election.

[38] The petitioner challenged the conduct of the Returning Officer who counted the votes of persons without addresses and or whose names appeared on the list of the Royal Commission of Inquiry ('RCI') as eligible voters for N45 in the election. The petitioner complained that the number of persons listed as being voters without addresses were no less than 4,000 persons and the voters whose grant of citizenship was under investigation by the RCI was no less than 1,400. The petitioner complained that 700 persons voted in the election and this number exceeded the narrow majority of 251 votes won by the first respondent. The petitioner complained that the second respondent's inclusion of dubious voters who were listed in the RCI in the electoral roll constituted a violation of art 119 of the Federal Constitution.

[39] Pursuant to art 119(1), every person who is a citizen who (a) has attained the age of twenty-one years on the qualifying date; (b) is resident in a constituency on such qualifying date or, if not so resident, is an absent voter; and (c) is, under the provisions of any law relating to elections, registered in the electoral roll as an elector in the constituency in which he resides on the qualifying date, is entitled to vote in that constituency in any election unless he is disqualified under cl (3) or under any law relating to offences committed in connection with elections

[40] Although the petitioner complained that there were 4,000 voters whose

grant of citizenship is under investigation by the RCI, 1,400 of whom were without address and 700 out of these 4,000 voters had voted in the 13th General Election held on 5 May 2013, unless and until the RCI has completed its investigation into these allegations and has made its findings as such, there were no merits in these allegations. As at 5 May 2013, there was no declaration made to revoke the citizenship of these alleged 4000 voters. There were no declaration made to prevent or stop these alleged 700 voters who had voted. Unless and until their citizenship has been revoked, they were entitled to vote in the constituency in which they were registered in the electoral roll as an elector or voter pursuant to art 119(1).

[41] Prior to the certification of the electoral roll, the petitioner did not challenge the propriety or correctness or validity of the electoral roll. Section 9A of the EA provides that after an electoral roll has been certified and notice of the certification has been published in the *Gazette*, the electoral roll shall be deemed to be final and binding and shall not be questioned or appealed against in, or reviewed, quashed or set aside, by any court. Once the electoral roll has been certified and *gazetted*, it is binding on the returning officer and on the second respondent. Once a person has been registered in the electoral roll, the returning officer cannot prevent or refuse the registered voter from voting in the elections: see *Muhammad Sanusi bin Md Nor lwn Mohd Tajuddin bin Abdullah dan lain-lain* [2009] 8 MLJ 131; [2009] 1 CLJ 1, *Tg Nawawi Tengku Ab Kadir v Lokman Muda & Ors* [1996] 1 CLJ 551.

[42] Further, it was erroneous for the petitioner to say that these 700 voters out of the 4,000 voters had voted in the election in N45 and had therefore affected the outcome of the election results bearing in mind that the majority was only by 251 votes. It must be noted that the investigation by the RCI is in respect of the whole of Sabah. The figures of 4,000, 1,400 and or 700 voters referred to by the petitioner were in respect of the whole of Sabah and not confined to N45 only. The petitioner did not specifically plead in paras 15 to 23 inclusive that these 4,000, 1,400 and or 700 voters referred to were in respect of N45 only.

[43] The petitioner also did not identify these alleged 700 voters whose citizenship was dubious or without addresses or were not qualified or eligible or entitled to vote in the election in N45 and which had affected the results of the election. Therefore the petition is defective.

[44] In paras 24, 25, 26, 27, 28 and 29 of the petition, the petitioner complained that the presiding officer at the polling station at SMK Muhibbah has failed to state the correct votes obtained in N45 in the Form 14 which was announced, prepared or certified by the presiding officer which they have reasonable reasons to believe as false or does not believe to be true. The

petitioner pleaded that the Form 14 states as follows: a total of 350 ballot papers were supposed to be in the ballot box at the stream; the total votes for all three candidates are 259; a total of three rejected votes; and a total of 262 ballot papers issued but were not placed in the ballot box.

[45] The petitioner submitted that the total number of ballot papers issued but were not placed in the ballot box (262) exceeded the majority of votes (251) obtained by the first respondent in the election and the total votes stated in the Form 14 did not tally. It was submitted that this discrepancy had created a reasonable suspicion on the accuracy of the number of votes tallied for the stream despite the certification of the Form 14 by the presiding officer and the counting agents. It was submitted that this discrepancy had also affected the election result.

[46] Regulation 24(1)(a) of the ECER provides that as soon as practicable after the close of the poll, the presiding officer shall secure the ballot box so as to prevent the introduction of any ballot paper into the ballot box, in the presence of and the security tape to be signed by each candidate or his election agent or polling agent and the presiding officer. The presiding officer shall determine the number of ballot papers issued to voters at the polling station (in this case at SMK Muhibbah), the number of unused and spoilt ballot papers and shall then prepare the ballot paper statement in Form 13 which shall be certified by the presiding officer and signed by each candidate or his election agent or polling agent who is present and who desires to sign the same: reg 24(1)(b) and (c).

[47] The counting of votes is provided in reg 25. Regulation 25(3) of the ECER provides that before the presiding officer proceeds to count the votes in the presence of each candidate or his election agent or counting agent who is present, (a) open the ballot box and (b) compare the number of ballot papers in the ballot box with the statement in Form 13 in order to ascertain that all ballot papers were accounted for. Under reg 25(4), if in comparing the number of ballot papers in the ballot box with the statement in Form 13, it appears that the number of ballot papers in the ballot box exceeds the number stated in Form 13, then the procedure described in the Third Schedule shall be adopted to determine whether an error has been made in the completion of the Form 13.

[48] After the completion of the counting of the votes, the presiding officer shall announce to every candidate or his election agent or counting agent who is present the number of votes given to each candidate and prepare a sufficient number of copies of the statement of the poll in Form 14 which shall be certified by the presiding officer and signed by each of the candidate or his

election agent or counting agent who is present and a copy shall be delivered to each candidate or his election agent or counting agent.

[49] The petitioner did not in the petition plead or refer to the Form 13 in respect of the polling station at SMK Muhibbah. The petitioner did not complain that the contents of Form 13 were wrong or incorrect. The petitioner did not request for the procedure described in the Third Schedule to be adopted to determine whether an error has been made in the completion of the Form 13 concerned. The Form 13 set out the number of ballot papers from the presiding officer, the total number of ballot papers issued to voters at the polling station, the number of spoilt ballot papers, the number of unused ballot papers and the total number of ballot papers to be accounted for in the ballot box.

[50] Form 14 sets out the total number of ballot papers to be accounted for in the ballot box as in Form 13, the number of votes by the electors for each contesting candidate, number of rejected ballot papers and total number of ballot papers issued to voters but not put in the ballot box.

[51] When the petitioner complained that the total of 350 ballot papers were *supposed* to be in the ballot box at SMK Muhibbah and that the total 262 ballot papers issued but were not placed in the ballot box, the petitioner alleged that the 262 ballot papers which were not placed in the ballot box exceeded the 251 majority votes obtained by the first respondent. The allegations were erroneous. (Emphasis added.)

[52] The petitioner had pleaded that the total votes for all three candidates at SMK Muhibbah were 259 votes with three rejected votes. These added to 262 votes or ballot papers put inside the ballot box. These were the total number of ballot papers to be accounted for in the ballot box as in Form 13 and in Form 14 also. The petitioner did not refer to nor challenge the correctness of the Form 13. If the petitioner had checked and compared Form 13 and Form 14, the total number of 262 ballot papers to be counted for in the ballot box would tally. The allegations that 262 ballot papers which were issued and not put in the ballot box could not be substantiated as pleaded because the petitioner's polling agent had on behalf of the petitioner signed on both Form 13 and Form 14 to signify the correctness of the total ballot papers in the ballot box.

[53] Further, Form 14 would give the number of votes by the electors for each candidate. The petitioner did dispute or challenge the correctness of the number of votes for each candidate at SMK Muhibbah and the petitioner did not plead that the result of the votes at SMK Muhibbah has in any way affected the election result in favour of the first respondent or in favour of the petitioner. Therefore there are no merits on these objections raised by the petitioner and

there are no merits and no necessity for the ballot papers, documents and records to be produced and inspected to determine the correctness of the number of ballot papers and the votes counted for each candidate.

[54] For the reasons given, the petition is defective, is hereby struck out and the first respondent is duly returned. Cost of RM30,000 to the first respondent and RM15,000 to the second respondent.

Petition struck out with costs of RM30,000 to first respondent and RM15,000 to second respondent.

Reported by Afiq Mohamad Noor